Davey Roofing, Inc. *and* United Union of Roofers, Water Proofers, and Allied Workers, Local 162, AFL–CIO. Case 28–CA–16394

February 19, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 28, 2001, Administrative Law Judge Burton Litvack issued the attached decision. The central issues[1] in this case are whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena, and by discharging employees Jesus Camargo and Jose Ramirez.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

[1] Other issues presented are whether the judge correctly found that the Respondent violated Sec. 8(a)(1) of the Act by interrogating Jose Ramirez about his union activities and by conditioning Ramirez' reinstatement on his agreement to refrain from union activity.

No exceptions were filed to the judge's dismissal of the allegations that the Respondent, by the actions of Salvador Guardado, interrogated employee Jesus Camargo about his union activities, unlawfully engaged in surveillance of employees' union activities, informed employees that it would be futile for them to support the Union, and threatened employees with suspension and discharge for supporting the Union.

[2] The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The Respondent filed reply briefs. The General Counsel and the Charging Party filed cross-exceptions and supporting briefs. The Respondent filed answering briefs.

[3] The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent contends in its exceptions that some of the judge's findings and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that such contentions are without merit.

We shall modify the judge's recommended Order to conform to the violations found, and in accord with *Excel Container*, 325 NLRB 17 (1997), and *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall substitute the attached notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

With regard to the central issues in this case, we agree with the judge's conclusions that the Respondent violated Section 8(a)(3) and (1) of the Act when it laid off employees Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena.[4] Contrary to the judge however, we find that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged employees Jose Ramirez and Jesus Camargo. We conclude that the Respondent established that it would have discharged these employees for insubordination even in the absence of their union activities.

A. Background

The Respondent is a California-based roofing contractor that does business in Las Vegas, Nevada. Patrick Kay is the Respondent's vice president of operations; Steve Howard is the manager of the Respondent's Las Vegas office and warehouse; and Salvador Guardado is a field superintendent for the Respondent at its Las Vegas facility. The Respondent's employees in Las Vegas are classified as operators, loaders, or roofers—depending on their work duties.

A campaign to represent the Respondent's residential roofing employees was launched in the summer 1999 by the United Union of Roofers, Water Proofers, and Allied Workers, Local 162, AFL–CIO (the Union). The Respondent's knowledge of the Union's organizing activities is not in dispute.

On Friday, January 21, 2000,[5] a union-sponsored organizing rally was conducted at the Employer's Las Vegas facility. Between 50 and 60 employees participated in the rally, which lasted approximately 1 to 1-1/2 hours. Employees Gonzales, Gonzalez, Ramirez, and Camargo attended the rally. During the rally, employees wore prounion T-shirts and shouted their support for the Union. The employees also attempted to present to Manager Steve Howard a petition asking the Respondent to sign a collective-bargaining agreement with the Union. The petition was signed by 61 of the Respondent's approximately 76 employees including Gonzales, Gonzalez, Camarena, Ramirez, and Camargo. Howard refused to accept the petition, claiming that he lacked the authority to "deal" with it. Later that day, the Union sent a copy of the petition to the Respondent's Las Vegas facility by facsimile. The Respondent then sent a copy of the petition to its Irvine office where it was received on Monday, January 24.

[4] We also agree with the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Jose Ramirez and by conditioning Ramirez' reinstatement upon his renunciation of support for the Union.

[5] All dates refer to 2000 unless otherwise indicated.

On January 24, the Respondent laid off employees Gonzales, Gonzalez, and Camarena, citing a slowdown in the Respondent's business. On January 27, the Respondent terminated employees Ramirez and Camargo for failing to sign safety warnings acknowledging safety violations at the worksite.

In late January or early February, Vice President Patrick Kay asked Ramirez if he "was with the Union" and then told him that "if [he] took [his] signature off of the petition . . . [Kay] could help [Ramirez] to get back [his] job."

B. Layoffs of Gonzales, Gonzalez, and Camarena

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the burden of showing that protected conduct was a motivating factor in the employer's decision. If the General Counsel meets this burden, then the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

1. Union activity was a motivating factor in the decision to lay off Gonzales, Gonzalez, and Camarena.

The judge concluded, and we agree, that the General Counsel met his burden of showing that the union activity of the alleged discriminatees was a motivating factor in the Respondent's decision to lay them off. First, as the judge found, it is undisputed that the Respondent knew of the union activity of Gonzales, Gonzalez, and Camarena. All three signed the petition, received by the Respondent, requesting that the Respondent sign a collective-bargaining agreement with the Union.

Second, the judge properly relied on the Respondent's timing of the layoffs as evidence of unlawful motivation. It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation. *Power Equipment Co.*, 330 NLRB 70, 74 (1999); *Abbey's Transportation Services*, 284 NLRB 698 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). Here, the timing of the layoffs supports a finding of unlawful motivation. The Respondent laid off Gonzales, Gonzalez, and Camarena the next business day after the union rally on January 21, and on the same day that its Irvine office received the petition from the Union, which each of them had signed.

Third, the judge correctly found evidence of animus in Vice President Kay's unlawful interrogation of employee Ramirez and Kay's offering of reemployment with the Respondent to Ramirez if he abandoned his support for the Union. According to the credited testimony, Kay asked Ramirez, who had been discharged a week earlier, whether he was still "with the union." Kay then told Ramirez that if he would remove his signature from the union petition Kay would help Ramirez to get his job back. While this conversation took place after the January 24 layoffs, it is evident that the Respondent harbored animus toward the recent union activity of its employees and was striving to ensure that its employees rejected the Union.

2. The Respondent failed to show that it would have laid off Gonzales, Gonzalez, and Camarena for economic reasons even in the absence of their union activity

We also agree with the judge's conclusion that the Respondent failed to establish its affirmative defense. The Respondent asserts that it laid off Gonzales, Gonzalez, and Camarena because of a business slowdown. The judge, however, found that Vice President Kay, the Respondent's witness, gave inconsistent and uncorroborated testimony regarding the slowdown of available work, while Celestino Gonzales credibly testified that at the time of the layoffs, his crew had been working between 8 and 10 hours a day, 6 or 7 days a week. Further, Celestino Gonzalez credibly testified that at the time of the layoff there was enough work for a week or two and that numerous houses were in the construction process, which would eventually require placement of roofing materials. The record supports these findings.

Finally, the judge observed that the Respondent failed to offer corroborating documentation of a slowdown in work either generally or specifically at the housing development where Gonzales, Gonzalez, and Camarena were assigned. The absence of such documentation is significant here, where the only evidence proffered in support of the business slowdown is inconsistent and uncorroborated oral testimony. See, e.g., *Reeves Rubber, Inc.*, 252 NLRB 134, 143 (1980) (having advanced an economic defense for a layoff made in suspicious circumstances, it was incumbent on employer to proffer more than oral testimony).

In these circumstances, we agree with the judge's conclusion that the Respondent failed to demonstrate by a preponderance of the evidence that it would have laid off Gonzales, Gonzalez, and Camarena for economic reasons even in the absence of their union activity.

C. Discharges of Ramirez and Camargo

The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employees Ramirez and Jesus Camargo purportedly for refusing to sign warnings acknowledging safety violations at the worksite. We disagree.

The Respondent contends that the refusal of Ramirez and Camargo to sign the warnings constituted insubordination in disregard for worksite safety. It argues that it discharged Ramirez and Camargo for such insubordination and that it would have done so even in the absence of their union activity. The judge found that the Respondent's asserted defense of insubordination failed because the testimony of Vice President Patrick Kay and Supervisor Salvador Guardado concerning the Respondent's decision-making process and its rationale for the discharges was "antithetical in nature and unworthy of belief." The judge concluded that the Respondent's defense was a pretext for ridding itself of union supporters. The record does not support the judge's conclusion.

The Respondent's system (SWEEP), which monitors and enforces compliance with safety provisions, has existed since early 1999. When safety violations are found, the violators receive warnings and are asked to sign them. In October 1999 Camargo received and signed a safety warning for an unsecured ladder, and Ramirez received and signed a warning for an unsecured ladder and hardhat violation.

On January 26, Supervisor Guardado visited several jobsites to conduct the monthly safety sweep. There is no dispute that Camargo and Ramirez committed safety violations that day. Guardado found roofer Camargo working on a rooftop with an unsecured ladder and no hard hat. Guardado issued him a warning, which Camargo refused to sign. That same day Guardado encountered Ramirez on a metal installation project with an unsecured ladder. Guardado issued him a warning, which Ramirez also refused to sign. In all, Guardado issued 12 warnings that day and Camargo and Ramirez were the only employees who refused to sign. When Guardado informed Kay by telephone that the two employees had refused to sign, Kay determined that the refusals were insubordinate, warranting discharge. Prior to this, no employee, including Camargo and Ramirez, had ever refused to sign a safety warning.

While the dissent makes much of the fact that Kay and Guardado gave differing testimony concerning the particulars of the telephone conversation that resulted in the decision to discharge, we are not persuaded that this difference supports the judge's finding that the Respondent did not in fact rely on the refusals to sign the safety warnings, but used them as a pretext for retaliation against union activity.

Concededly, the versions of Kay and Guardado are somewhat different from each other. In essence, Kay said that he would discharge Ramirez and Camargo if they persisted in their insubordinate refusal to sign. Guardado testified that Kay told him to discharge Ramirez and Camargo for their initial refusal to sign, i.e., Guardado does not mention a second chance for Ramirez and Camargo. In our view, this difference cannot obscure the fact that Ramirez and Camargo were discharged for an insubordinate refusal to sign, whether it be for a first refusal or a persistent refusal.

Nor do we find evidence of the disparate treatment of Ramirez and Camargo, which would support a finding of pretext. Contrary to the dissent's assertion, there are no other similarly situated employees against which to compare the Respondent's treatment of Ramirez and Camargo. No other employees have ever refused to sign safety warning notices. Nor is there evidence of discipline for other conduct involving safety matters.

Our colleague says that there was disparate treatment as between two employee-fighters (Rickie Leinenweaver and Manuel Ramos Jr.) and the two alleged discriminatees. Our colleague asserts that fighting is a safety issue, and thus there is disparate treatment. However, even assuming arguendo that fighting involves a safety hazard, the essential point is that the two alleged discriminatees were not fired for a safety violation. Rather, they were fired for insubordinate refusals to acknowledge the safety violations.

Further, there is no disparate treatment as between employee Hooker and the alleged discriminatees. Concededly, Hooker ignored a supervisor's instruction, and this may have constituted insubordination. However, his insubordination did not involve a safety matter. The insubordination here did involve a safety matter. Thus, there is no disparity as between the treatment of Hooker and the treatment of the alleged discriminatees.[6]

Finally, we recognize that Kay told Ramirez, after the discharge, that he would give Ramirez his job back if he would take his name off the union petition. However, the fact that Kay would rescind the discharge upon that condition does not controvert the point that the discharge itself was for cause.

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[6] Chairman Battista finds, contrary to the dissent, that the record shows that the Respondent also discharged another employee for insubordinate conduct. Thus, GC Exh. 10(h) is a discharge notice issued to employee Rosa Martinez. It states that the Respondent fired Martinez for insubordination when she left payroll checks out in the open where they were subject to theft. Instructed by her supervisor to place all paychecks under lock and key, Martinez answered that her own methods had always worked in the past and suggested that the supervisor pass the checks out herself. The discharge notice goes on to state that this kind of behavior "is considered insubordination and is grounds for immediate termination under the Company's personnel policies."

Although the judge generally discredited the Respondent's witness, GC Exh. 10(h) speaks for itself. Indeed, the judge acknowledged that the Respondent discharged Martinez for insubordination. See sec. IV,A,par. 16, and fn. 60, of the judge's decision.

For all of these reasons, we conclude that the Respondent has established that it would have discharged Ramirez and Camargo absent their union activities. We, therefore, dismiss this allegation of the complaint.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 4 and renumber the subsequent paragraphs.

ORDER

The National Labor Relations Board orders that the Respondent, Davey Roofing, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union membership, sympathies, or activities.

(b) Conditioning its reinstatement of discharged employees upon their renunciation of their support for the Union.

(c) Laying off employees because of their support for the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

(b) Make Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena, and within 3 days thereafter notify them in writing that this has been done and that their unlawful layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[7] Copies of the notice, in English and Spanish on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 24, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 19, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I join the majority in concluding that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employee Jose Ramirez and by conditioning Ramirez' reemployment on his abandonment of the Union. I also join the majority in finding that the Respondent laid off employees Celestino Gonzales, Martin Gonzalez and Ricardo Camarena in violation of Section 8(a)(3) and (1). However, I disagree with the majority's dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging employees Jose Ramirez and Jesus Camargo. The judge properly found that the Respondent's reasons for discharging Ramirez and Camargo were a pretext for retaliation against their union activity.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Background

Ramirez and Camargo participated in the union organizing campaign in the summer 1999. Together with some 60 employees, they attended a rally on January 21, 2000,[1] at the Respondent's Las Vegas facility. Ramirez and Camargo signed a union petition asking the Respondent to sign a collective-bargaining agreement with the Union, which the Union attempted to present to the Respondent at the January 21 rally and which was received by the Respondent on January 24.

During a routine safety sweep on January 26, Ramirez and Camargo were cited for not securing a ladder and Camargo was additionally cited for not wearing a hardhat. When Supervisor Salvador Guardado asked them to sign a warning acknowledging these safety violations, Ramirez and Camargo refused to do so. The Respondent discharged Ramirez and Camargo allegedly for insubordination by refusing to sign the warnings.

About a week after his discharge, Ramirez returned to the Respondent's office to get his final paycheck. Ramirez saw Vice President Patrick Kay who asked Ramirez if he "was with the Union." Kay then told Ramirez that if he would take his name off of the petition Kay would help Ramirez to get his job back.

The union activities of Ramirez and Camargo were a motivating factor in the Respondent's decision to discharge them

The majority has found, and I agree, that the General Counsel established under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the union activity of Gonzales, Gonzalez, and Camarena was a motivating factor in the Respondent's decision to lay off the three employees. For essentially the same reasons, the General Counsel has shown that the union activity of Ramirez and Camargo was a motivating factor in the Respondent's decision to discharge them. Thus, Ramirez and Camargo participated in the union rally on January 21 and signed the union petition asking the Respondent to sign a collective-bargaining agreement with the Union. The Respondent's receipt of the union petition, signed by Ramirez and Camargo, establishes the Respondent's knowledge of their union support. The timing of the discharges of Ramirez and Camargo, occurring only 3 days after the Respondent received the union petition, establishes the Respondent's animus toward union activity. The Respondent's animus is further established by its unlawful layoff of Gonzales, Gonzalez, and Camarena. Finally, the Respondent's unlawful interrogation of Ramirez and its conditioning of Ramirez' reemployment on his abandonment of the Union is additional evidence of animus toward the union activity of its employees.

The Respondent has not shown that it would have discharged Ramirez and Camargo for insubordination in refusing to sign safety warnings even in the absence of their union activity

The Respondent asserts that it discharged Ramirez and Camargo for insubordination in connection with their refusals to sign warnings acknowledging safety violations committed by them on January 26. There is no question that Ramirez and Camargo committed the safety violations and refused to honor Supervisor Guardado's request for them to sign warnings acknowledging the violations. This is not a case, therefore, where the reasons asserted for the discharge are false. The inquiry does not end with this finding, however. An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that it would have taken the same action for this reason even in the absence of union activity. *Power Equipment Co.*, 330 NLRB 70, 74 (1999); *Kellwood Co.*, 299 NLRB 1026, 1028 (1990). Where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, . . . not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent protected conduct." *Golden State Foods Corp.*, 340 NLRB No. 56, slip op. at 4 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981). The Respondent here has failed to make the required showing.

First, the judge properly found that the differences between the testimonies of Vice President Kay and Supervisor Guardado regarding the Respondent's decision-making process for discharging Ramirez and Camargo rendered the Respondent's defense "not worthy of belief." Kay and Guardado gave wholly different accounts of what transpired after Ramirez and Camargo refused to sign the warning notices. According to Kay, who spoke to Guardado after Guardado learned that the employees would not sign, Guardado was instructed by Kay to go back to Ramirez and Camargo and to reassure them that they would not be terminated if they signed the warnings. Kay testified that he concluded that Ramirez and Camargo should be terminated only after the employees continued to refuse to sign the warnings the second time.

Guardado's testimony sharply contradicted Kay's account. Guardado testified that, upon first learning that Ramirez and Camargo refused to sign, Kay immediately ordered that they be terminated for their conduct. Although Kay testified that Ramirez and Camargo were terminated not only for refusing to sign the warning notices, but also because the employees acted disrespect-

[1] All dates are in 2000 unless otherwise indicated.

fully toward Guardado, Guardado denied that either Ramirez or Camargo acted disrespectfully in any way toward him.

Faced with such variance in testimony, the judge properly found that the Respondent's asserted reasons for discharging Ramirez and Camargo were "not worthy of belief." While the alleged discriminatees had refused to sign the warnings of safety violations, the judge essentially found that the Respondent had not in fact relied on their refusal to do so; the Respondent had instead seized upon the refusals as a pretext for retaliation against union activity.

The finding of pretext is further supported by the Respondent's harsh treatment of Ramirez and Camargo. The record shows that the Respondent has merely suspended other employees for serious acts of misconduct, while it discharged Ramirez and Camargo for refusing to sign a warning. As noted in General Counsel's Exhibit 10, employees Rickie Leinenweaver and Manuel Ramos Jr., in May 2000, engaged in fighting and abusive language at the worksite. Each employee was suspended 5 days for their misconduct. In addition, employee David Hooker ignored his supervisor's instructions to report to the designated jobsite of a key customer. Hooker's failure to follow instructions resulted in damage to customer relations. He was suspended for 3 days.

The majority would discount the evidence of Leinenweaver, Ramos, and Hooker's lesser discipline for serious misconduct because it does not involve safety matters. This distinction does not bear scrutiny. A fight on the worksite endangers the safety of all the employees working at the time. It is at least as serious a matter as a refusal to sign a safety warning. Further, while Hooker's insubordination in ignoring a supervisor's instructions did not involve a safety matter, it was serious misconduct that damaged relations with a key customer. Yet Hooker was simply suspended for 3 days.

As my colleagues acknowledge, the Respondent violated the Act subsequent to discharging these employees by informing Ramirez that he could have his job back if he took his name off a union petition. The fact that the Respondent was willing to take this allegedly insubordinate employee back, if he would only renounce an act which evidenced his support of the Union, is further evidence that the Respondent was not truly concerned with the insubordination of these employees, but was actually concerned about their union activities.

Finally, the Respondent's safety policies and procedure manual does not contain a requirement that employees sign safety warnings. Nor does it mention any punishment for failure to sign warnings. The absence of such provisions belies the Respondent's assertion that signing safety violation warnings is of such importance that failure to sign the warnings warrants immediate discharge.

For these reasons, the Respondent failed to establish its affirmative defense, leaving intact the General Counsel's showing that the Respondent discharged Ramirez and Camargo for their union activity.

Dated, Washington, D.C. February 19, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you regarding your union membership, sympathies, or activities.

WE WILL NOT condition your reinstatement from discharge upon your renunciation of support for the Union.

WE WILL NOT lay off employees because of their support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days of the date of the Board's Order, offer Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

DAVEY ROOFING, INC.

John Giannopoulos, Esq., for the General Counsel.
Thomas Lenz, Esq. (Atkinson, Andelson, Loya, Ruud & Romo), of Cerritos, California, for Respondent.
Barry S. Jellison, Esq. (Davis, Cowell & Bowe), of San Francisco, California, and *Antonio Diaz, Local Organizer,* of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The original and amended unfair labor practice charges in this case were filed by United Union of Roofers, Water Proofers, and Allied Workers, Local 162, AFL–CIO (the Union) on March 21 and May 25, 2000, respectively. After an investigation, on May 25, 2000, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint, alleging that Davey Roofing, Inc. (Respondent) engaged in, and in engaging in, acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act, the Act. Respondent timely filed an answer, denying the alleged unfair labor practices. Pursuant to a notice of hearing, the above-described matter came to trial before me on October 23–26, 2000, in Las Vegas, Nevada. At the trial, all parties were afforded the opportunity to examine and to cross-examine each witness, to introduce all relevant documentary and other evidence, to orally argue their legal positions, and to file posthearing briefs. Counsel for the General Counsel and counsel for Respondent filed posthearing briefs, each of which has been carefully considered. Accordingly, based on the entire record, including the posthearing briefs and my assessment of the demeanor, while testifying, of each of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of California Corporation, maintains a place of business, consisting of an office and warehouse, in Las Vegas, Nevada (Las Vegas facility), where it is engaged as a roofing contractor in the building and construction industry, performing primarily residential roofing work. In the normal course and conduct of its business operations, during the 12-month period ending March 21, 2000, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Las Vegas facility goods and products valued in excess of $50,000, directly from sources located outside the State of Nevada. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The General Counsel alleges that Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act by, on or about January 25, 2000, laying off and refusing to recall its employees, Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena,[1] and by, on or about January 26, 2000, discharging and refusing to reinstate its employees, Jesus Camargo and Jose Ramirez. Further, the General Counsel alleges that Respondent acted in violation of Section 8(a)(1) of the Act by engaging in surveillance of its employees' union activities, by interrogating employees as to their activities and support for the Union, by threatening employees with suspension and/or discharge because of their union activities, by informing employees that their support for the Union would by futile, and by conditioning reinstatement of employees upon their agreement to refrain from engaging in activities in support of the Union.

Respondent denied the commission of the alleged unfair labor practices and contends that alleged discriminatees Camargo and Ramirez were terminated for insubordination and that alleged discriminatees Gonzales, Gonzalez, and Camarena were laid off for economic reasons.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The record establishes that Respondent is a State of California corporation engaged in business in the building and construction industry as a roofing contractor, with its corporate office located in Irvine, California; that Respondent conducts its business operations throughout California and in Las Vegas, Nevada, and surrounding areas; that 95 percent of the roofing

[1] Alleged discriminatee Ricardo Camarena failed to appear and testify at the trial, and counsel for the General Counsel offered no explanation for Camarena's failure to do so and refused to move to dismiss the complaint allegations as to him. In these circumstances and believing that Respondent's counsel effectively had been denied the opportunity to cross-examine Camarena and that, therefore, Respondent would be denied due process, I informed the parties I would neither make findings as to the said alleged discriminatee nor, in the event I found merit to the complaint allegations, award him any remedy. Subsequent to the close of the hearing, having reconsidered the issue, I clearly erred in my ruling. Thus, in *Riley Stoker Corp.*, 223 NLRB 1146, 1147 (1976), the Board held that "if . . . the record sustains the allegations of unlawful discrimination against discharged employees, their testimony is not a sine qua non for relief under the Act." More recently, in *Kajima Engineering & Construction*, 331 NLRB 1604 (2000), notwithstanding that an alleged discriminatee was ill and did not attend the hearing, the Board found that he had been unlawfully terminated and awarded him a remedy. While counsel for the General Counsel offered no explanation for Camarena's failure to testify and while I continue to harbor due process concerns, the principle remains the same. Thus, Camarena's failure to appear does not preclude findings in his behalf, and I reverse my ruling at the trial. In this regard, as Respondent's defense is a general economic one and not specific as to any of the members of the Celestino Gonzales loading crew, it does not appear that Respondent has suffered prejudice by my ruling change.

work performed by Respondent consists of residential tile roofing work; and that, except for its commercial roofing employees in the Las Vegas, Nevada area, who are represented by the Union, none of Respondent's employees are represented by any labor organizations. Tim Davey is Respondent's president and its majority shareholder; Brian Flaherty is its minority shareholder and senior vice president; Patrick Kay is Respondent's vice president of operations; and Cheryl Daniel is its manager of human resources. At all times material, Steve Howard was the manager of Respondent's Las Vegas, Nevada office and warehouse facility and responsible for its residential roofing operations in the northern Las Vegas area, and Salvador Guardado, a field superintendent, was responsible for Respondent's residential roofing operations in the southern Las Vegas area. In Las Vegas, Respondent employs no permanent commercial roofing employees and obtains any workers, who would perform such work, from the Union's hiring hall, employs one permanent employee, who is represented by the Union and who performs both commercial and residential roofing work, and employs approximately 76 employees, who perform residential roofing work. These employees are classified as operators, who drive heavy pieces of equipment, such as petty booms or forklifts, which are used to lift the roofing materials onto the roofs of the residential homes on which Respondent's employees are working; loaders, who actually place the roofing material in specified places on the roofs; and roofers, who actually install the roofing materials, including paper, tile, and metal work, onto the roofs.[2]

The record further establishes that the Union's organizing campaign amongst Respondent's residential roofing employees commenced during the summer 1999, with union agents visiting said employees at their homes and at Respondent's job sites, distributing flyers to employees outside Respondent's office and warehouse facility, and conducting meetings with groups of Respondent's employees at the Union's meeting hall in Las Vegas. While engaging in the organizing efforts, it appears that the Union made no effort to keep its desire to represent the residential roofing employees a secret from Respondent, informing the latter of its desire to enter into negotiations for a collective-bargaining agreement, covering the residential roofing employees, and, according to William Penrose Jr., an International representative for the Union, actually engaging in discussions with Respondent on specific terms of such an agreement. Further, Respondent's officials conceded being aware of the Union's ongoing organizing campaign. Thus, Kay and Daniel both testified that they had seen copies of leaflets, inviting Respondent's employees to meetings with union officials. Moreover, Salvador Guardado, who testified that he became aware of the Union's organizing campaign in late 1999, stated that union leaflets "were everywhere" and that, upon being given one, inviting employees to a meeting the following week at the Union's meeting hall, by an employee, he decided to attend in order to "see what the Union has to offer."

In this regard, there is no dispute that Guardado did endeavor to attend a union meeting with Respondent's employees at the former's meeting hall in Las Vegas one night during the fall 1999. Placing the incident as occurring on October 27, Antonio Diaz, the Union's local organizer, testified that, prior to the start of the meeting, along with approximately 20 employees, he was standing in the parking lot in front of the Union's office and that Guardado, whom he recognized, approached him. "Sal came up. He had one of the flyers that we were handing out . . . inviting [Respondent's employees] to a worker meeting . . . he said he worked for [Respondent], he was an employee and he wanted to participate in the meeting." Diaz responded, informing Guardado that he would not permit the former to attend and that Guardado would have to leave. Rather than replying, Guardado just turned and walked towards his truck, which was parked across from the front of the Union's office, entered the vehicle, and drove off. Guardado's version of what occurred is virtually identical. According to Respondent's field superintendent, on his own volition, on the night of the scheduled meeting, he drove in his truck to the location of the union meeting, parked in a parking lot 25 feet from the Union's office, got out of his truck, and noticed Diaz and another individual approaching him. Guardado walked towards the two men, "and there Mr. Diaz . . . [asked] me . . . what was my position [with Respondent], and I told them I was a supervisor. Then, they told me that the meeting wasn't for supervisors or superintendents, that I couldn't go in. . . . So, I left." Guardado, who recalled the incident as lasting no more than seven minutes, conceded that he recognized one employee amongst the group of individuals standing outside the Union's office—alleged discriminatee, Jesus Camargo.[3]

Camargo testified that, subsequent to the incident at the Union's office, Guardado commented to him about the Union on two separate occasions. On the first occasion, along with two other employees, he was in Respondent's office waiting for a job assignment and talking about the Union. Guardado approached and said "that the Union wasn't good and that the benefits weren't any good either." According to Camargo, the second occasion occurred the day after another union meeting when he was at Respondent's facility with other employees, and they were speaking about the Union. Guardado "came up to us . . . and he told us not to go the meetings because we could be suspended or fired."[4] Alleged discriminatee Jose Ra-

[2] Specified roofers are designated and act as foremen over crews of roofers, and operators have foreman responsibilities over the crews of loaders, who work with them.

[3] Camargo, who recalled the incident as occurring at the end of December, testified that, along with approximately 30 other employees of Respondent, he was standing outside the Union's office, prior to the start of the scheduled meeting, when Guardado drove into the parking lot, got out of his car, and walked over to the door of the Union's office where Antonio Diaz and his father were standing. "He said that he was interested in going into the meeting because he wanted to be part of the Union," and "the organizers told him he couldn't . . . because he was . . . a supervisor." Another alleged discriminatee, Jose Ramirez, testified that he, also, attended this union meeting, that he recalled the occurrence of the incident involving Guardado, and that another alleged discriminatee, Ricardo Camarena, also attended the union meeting.

[4] In his pretrial affidavit, Camargo combined each of Guardado's alleged comments into one conversation at a jobsite. Also, during cross-examination, he contradicted himself, stating that he was alone during his alleged second conversation with Guardado.

mirez also recalled speaking to Guardado two or three times about the Union. He recalled that the last of these conversations occurred on or about January 24, 2000, in Respondent's office, and Guardado "asked me if I supported the Union." To this, Ramirez replied "that I was thinking about it."[5] While he denied warning any employees they would be suspended for going to union meetings, Guardado admitted having one conversation about the Union with Camargo—telling him "as a friend" that "maybe what the Union was offering wasn't really what was going to happen."[6] Further. Guardado failed to deny what Ramirez attributed to him.

There is no dispute that, on Friday, January 21, 2000, Respondent's employees held a rally, organized and conducted by the Union, outside of Respondent's office and warehouse facility in Las Vegas. According to Antonio Diaz, "the workers . . . felt that they should sign a petition to turn into their employer" and that they wanted to stage a rally in front of Respondent's office on the day on which they would present it to Respondent. The petition, General Counsel's Exhibit 4, bears the heading, "This petition is a request by your roofers listed below that you seriously consider and sign the residential contract with local #162. This contract we feel is fair and would be beneficial to our families with hospitalization and pension benefits,"[7] and, Diaz testified, was distributed amongst Respondent's residential roofing employees during the "few" weeks prior to January 21 for signing. Diaz added that the purpose of the rally was to present the petition to Respondent so that Tim Davey would understand the desire of Respondent's residential roofing employees for representation by the Union, and it was scheduled to commence at approximately 3 p.m., the time at which employees arrived at Respondent's facility in order to receive their paychecks.

Alleged discriminatees Camargo, Ramirez, Celestino Gonzales, and Martin Gonzalez testified that, along with 50 to 60 other employees, they participated in the rally late in the afternoon on Friday, January 21, outside of Respondent's Las Vegas office and warehouse facility and that they signed the above-described petition.[8] The rally lasted approximately 1 to 1-1/2 hours as the demonstrators, who wore union logo T-shirts and shouted their support for the Union, waited for fellow employees, who had yet to obtain their paychecks, to join them in presenting their petition, which was carried by Diaz, to Steve Howard. At one point while the employees gathered, Howard walked outside through the front door, observed the size of the crowd, and went back inside.[9] When he deemed the number of demonstrators sufficient, with the employees behind him, Diaz attempted to enter the facility through the front door; however, he discovered that the doors had been locked. Then, Diaz and the employees went around to the back of the facility in order to enter the office through the warehouse entrance. Inside the warehouse, they encountered Howard, and Diaz informed Howard that he had the employees' petition and wanted to present it to Howard. The latter refused to accept it, claiming a lack of authority to do so or to "deal" with Diaz.[10] Thereupon, Howard turned and walked into Respondent's office, locking the door behind him. Later that day, Diaz returned to the Union's office and sent a copy of the residential roofing employees' petition to Respondent's Las Vegas facility by facsimile. Finally, Cheryl Daniel admitted that the Las Vegas office sent a copy of the petition to Respondent's Irvine office via an overnight delivery service where it was received on Monday morning and that additional copies were sent directly to Patrick Kay and Tim Davey, and Patrick Kay admitted reviewing the petition, giving a copy to Tim Davey, and discussing it with the Las Vegas office superintendents.[11]

[5] During cross-examination, Ramirez changed his testimony, stating, "He was asking me if I supported the Union, if I agreed with them." Ramirez recalled a similar conversation with Steve Howard "towards the beginning of January" in his office. Howard "only asked if I was involved with the Union," and Ramirez responded "that I was thinking about it." During cross-examination, Ramirez contradicted himself, testifying, "He was just asking me if I was going to the Union meetings, and I said no." In either case, Howard failed to appear at the hearing and did not deny what was attributed to him by Ramirez.

[6] I will discuss Guardado's testimony regarding the circumstances of this comment infra.

[7] Diaz testified that he drafted the language, which headed the petition.

[8] There are 61 signatures on the petition. Camargo, Ramirez, Gonzales, and Gonzalez each identified his signature on the petition. Celestino Gonzales' signature appears twice on the document. There is no record evidence that Ricardo Camarena was present during the rally on January 21; however, while no witness identified it, what appears to be his signature is on the second page of the petition between the signatures of Celestino Gonzales and Martin Gonzalez.

[9] It is clear that Respondent's officials in Irvine were aware of what was occurring in Las Vegas. Thus, Patrick Kay testified that "they'd called me and let me know that the Union was outside the Las Vegas office having some employees sign a piece of paper."

[10] Patrick Kay denied that Howard was acting under instructions from management in Irvine—he was "acting on his own." According to Kay, he did not learn until the next day that Howard had refused to accept the employees' petition.

[11] There is no dispute, and Patrick Kay testified, that "a week . . . after reviewing [the] petition . . . [Respondent's] management team . . . put together a Power Point—we felt it was a good time to communicate to all our employees" at the Las Vegas office facility. As to what prompted this meeting, during cross-examination, Kay said that, upon examining the petition, he discussed it with Tim Davey and other company officers, and "we . . . knew . . . it was time to talk to our employees." Asked specifically if the meeting was in direct response to the rally and petition, Kay retreated, stating "I'm not sure whether it was the petition or some of the flyers." Having listened to the entirety of Kay's testimony, Cheryl Daniel specifically denied that the rally and petition precipitated the meeting with the Las Vegas roofing employees, asserting "it didn't have anything to do with the petition" and the timing was pure "happenstance." Rather, "we were aware of flyers that the Union was distributing to our employees, and that had been ongoing for a while, and then I was aware of some confusion from our field employees as to how they were being paid, and so we decided that it was a good time to meet with them and discuss our variable piece rate." She added that preparation of the slide presentation had commenced prior to the employees' rally. In any event, on either the last Friday in January—January 28—or the first Friday in February, members of Respondent's management team, including Davey, Kay, Daniel, the vice president for finance, Howard, and Guardado, held a meeting with the Las Vegas residential roofing employees at its office and warehouse facility, with Davey conducting the meeting. He projected transparent slides, in Spanish and English, onto video screens and "basically talked about the different . . . houses, how houses that take longer pay more

On the following Monday, January 24, Respondent informed alleged discriminatees Celestino Gonzales, an operator for Respondent,[12] Martin Gonzalez, a loader, and Ricardo Camarena, a loader, that they were being laid off. The two loaders worked with Celestino Gonzales, forming a loading crew,[13] for which he was the crew leader,[14] and, at the time of their layoffs, the crew had been performing loading work on Respondent's Red Rock jobsite, a large residential housing development. Celestino Gonzales testified that his crew worked at the jobsite on the Saturday and the Sunday following the rally and were working[15] there on Monday afternoon when Steve Howard approached him at approximately 3 p.m. that day. According to Gonzales, Howard "told me to finish the job we were doing there and to take note of everything, the hours that we had worked . . . and to take it to the office so that we could be paid. Then I asked him why, and he told me that the company was only giving him a house per day, that the job was slowing down. . . . He said the group was laid off."[16] Gonzales doubted Howard was telling him the truth as "there were more houses there where they were laying the papers. There was a lot of work," and asked Howard "why" they were being laid off if his crew was "working well;" Howard reiterated "that the job was going slow." As to this, Gonzales testified that, prior to his layoff, no one had mentioned to him a possible slow down in their work and his crew had been working "six or seven days per week" and between 8 and 10 hours per day. Martin Gonzalez testified that, on the day of his layoff, he observed Steve Howard speaking to his uncle, Celestino Gonzales. Celestino then informed Camarena and him that the three of them were being laid off. According to Gonzalez, a short while later, the three of them went to Respondent's office in order to turn in their time sheets. There, they spoke to Steve Howard in the rear of the office. "He said that we weren't fired, that work was slow, that we were laid off, and that he would . . . recall us when they had more work." During his cross-examination, Celestino Gonzales was also able to recall this conversation, stating that "[Howard] said the only reason [we were] being laid off was because they did not have enough work. He said that at Red Rock . . . they were only going to get one house per day. I told him that [there] was a lot of work. He said that he had to use the other long-term employees to do the work." Martin Gonzalez recalled that Celestino "did ask" if the layoffs had anything to do with the Union and that "Howard said that he had nothing to do with the Union and he didn't want to do anything with them and only that the job had slowed down." As to the work situation at the time of his layoff, Gonzalez said that "there were six houses left [ready for roofing materials]"; that it would have taken "more or less a week or maybe two weeks" to complete his uncle's crew's work on the job site; and that many more homes were under construction at the Red Rock project.

Respondent's defense to the layoffs of alleged discriminatees, Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena, is an economic based one—that said layoffs were motivated by a business slowdown and a consequent need for Respondent to reduce its work force. At the outset, Patrick Kay conceded that Steve Howard made the decision to lay off the three alleged discriminatees without any input from him. Notwithstanding Kay's admission, Cheryl Daniel, who testified subsequent to Kay and who was present in the hearing room during Kay's testimony, insisted that Kay "brought to my attention that [the alleged discriminatees] were going to be laid off . . . the day before they were laid off,"[17] and "he told me that he was going to be laying off these individuals."[18] Assuming Kay was truthful regarding Steve Howard's role in the layoffs, the latter failed to appear and testify at the hearing.[19] Thus, other than the testimony of Celestino Gonzales and Martin Gonzalez regarding Howard's rationale for their layoffs, there is no record evidence as to the necessity for a layoff or as to the selection of the three alleged discriminatees for layoff. Nevertheless, Kay sought to explain the layoffs of the Celestino Gonzales crew as resulting from a decline in available work. In this regard, during direct examination by Respondent's counsel, asked if, during 2000, there had been a change in the availability of work for loaders, Kay initially replied, "No. It was steady." Then, asked if he recalled laying off a loading crew, Kay answered, "I'm not sure of the month, but it was a slow time. It was when we slowed down."[20] Asked by me to explain his inconsistent answers, Kay averred he "misunderstood" what he

money than houses that are . . . easier, discussed the pay, the piece rate of all the different types of tile." The slide demonstration ended with the printed words, "We never lie to you. We will always tell you the truth." Finally, Daniel conceded that the purpose of the slide presentation was to demonstrate that their current compensation system was better than offered by the Union.

[12] During direct examination, Gonzales said that he was employed by Respondent as a driver, operating a sky track machine. During cross-examination, he gave his job title as operator.

[13] Gonzales testified that as an operator the machine he operated was the "sky track," which would hoist pallets of tile to the roofs of the houses. He further testified that he would obtain tiles from trailers and take the material to the homes on which he and his crew were instructed to work. While he would unload the material, one loader would clean the area and the other would climb up to the roof "and work the house," piling tiles at preestablished intervals.

[14] Gonzales denied having any responsibility for the two loaders on his crew "because they also know their jobs." While adding that his responsibility went only to the job itself, he conceded that "I was in charge of [telling the other employees the location of their work, the tile to be used, and the color]" and that he maintained the time records for each person on his crew. As will be discussed infra, Respondent argues that Gonzales was a supervisor within the meaning of Sec. 2(11) of the Act.

[15] Gonzales' crew would be working on "two or three" houses at any particular time.

[16] Asked if doing just one house per day would have kept his crew busy, Gonzales conceded, "One house, no, it's not sufficient."

[17] Presumably, this was Sunday, January 23.

[18] Refreshed with Kay's testimony, Daniel conceded that "maybe my assumption that he made that decision is incorrect. I don't know."

[19] Counsel for Respondent stated that he was unable to locate Howard, who is no longer employed by Respondent.

[20] Asked if any operators or loaders were hired in Las Vegas after the layoffs of the three alleged discriminatees, Cheryl Daniel replied, "To the best of my knowledge, we're still retaining three crews, three loading crews, and they're the same three loading crews with the same operators that were employed at the same time that Celestino and his crew were employed."

had been asked and maintained that "there's been no change since the date of that . . . layoff until today of productivity as far as us doing more work, volume of work since then."[21] But, during cross-examination, when asked if there are slow months in Nevada, Kay seemingly affirmed his original answer, replying "Nevada is very steady. [We're] very fortunate." Immediately thereafter, he further confused matters, stating "it depends on how much work is awarded us."[22] Moreover, while there is no record evidence as to why Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena were chosen for layoff, Kay generally testified that Respondent relies upon "seniority, productivity" as factors in selecting individuals for layoff. Daniel contradicted Kay as to the specific factors and as to which factor has priority, stating "assuming that employees have the same level of skill and are equally productive, then seniority is the determining factor as to who will be laid off." Also, she asserted that she examined Respondent's employment records and "verified" that the members of the three other loading crews, which Respondent employed in January 2000,[23] all had seniority over Gonzales, Gonzalez, and Camarena; however, Respondent offered no corroborative records.

Likewise, Respondent failed to offer any documentary evidence, demonstrative of a decline in its Las Vegas area business operations, corroborating Patrick Kay's testimony that the layoffs of the three alleged discriminatees occurred during a slow down in its Las Vegas area business.[24] Nevertheless, there is record evidence regarding Respondent's hiring and use of employees during the period immediately preceding and subsequent to the layoffs of Gonzales, Gonzalez, and Camarena. Thus, examination of General Counsel's Exhibit 12 discloses that, during the period December 1999 through September 2000, Respondent continued to hire workers, engaging no less than 74 residential roofing employees on either a temporary or full-time basis.[25] Examination of Respondent's Exhibit 17 discloses that, subsequent to the layoffs of the Celestino Gonzales crew, while no operator was hired to replace Gonzales,[26] three loaders were hired—Edilfrido Rivas on June 15, 2000, Mariano Ortiz on July 26, 2000, and German Martin on August 21.[27] While it does not distinguish between work done before and after the layoffs of the alleged discriminatees, General Counsel's Exhibit 15 discloses that, during the period October 1999 through the date of the trial, approximately 40 roofing employees, other than individuals, who are classified as operators or loaders, performed some loading work and were compensated for the work. Finally, with regard to the Red Rock housing development project, the jobsite from which the Celestino Gonzales crew was laid off, Gonzales testified that he returned there on two occasions after his layoff—"eight days afterwards and 15 days afterwards"—and that, on each occasion, he observed a loading crew performing work. As to how this crew came to be working on the Red Rock project, Gonzales testified, "the company took another group over there to work" from another jobsite.

With regard to alleged discriminatees, Jesus Camargo, a roofer, and Jose Ramirez, a roofer, analysis of the record discloses that each was terminated by Respondent on or about

[21] Kay was contradicted by Daniel on this point. She testified, "It was my understanding that . . .work had slowed down considerably . . . for the month of February, and so one of the loading crews that had been working on another job that was wrapping up was moved to Red Rock." She added, "This was indicated to me by Pat Kay."

[22] Daniel testified that, in a conversation with her at the time of the layoffs, Kay ".had indicated that [work] had slowed down." Kay failed to corroborate this hearsay testimony.

[23] According to Daniel, the operators for these three loading crews were Antonio Martir, Rene Rivas, and Reas Hernandez. Analysis of GC Exh. 4, the January 21 petition, reveals that the signature of none of them appears on the document.

[24] Cheryl Daniel testified that, during her preparation for the instant trial, she attempted to "verify" that the three layoffs had occurred during a period of a slow down in work by asking Respondent's comptroller to provide her with "labor costs for the months of October to current." She was about to testify as to her findings when I informed her I was not interested in what she did for trial preparation unless she had been involved in the decision to lay off the alleged discriminatees. Daniel replied, "I was not involved in the decision." In his posthearing brief, counsel for Respondent discussed the content of the "data," which Daniel asserted she reviewed, and, in fns. 26 and 27 of the document, counsel contends that he offered the documents into the record and that I "declined to accept" the data and argues that I ruled inconsistently inasmuch as I received GC Exh. 15, a summary of, presumably, voluminous material, which counsel for the General Counsel had subpoenaed prior to the trial. Finally, at fn. 30 of his posthearing brief, counsel requests that I reopen the record "to allow for further examination of [Respondent's] economic defenses and evidence in support of them."

In these regards, the salient fact is that counsel for Respondent never offered the "labor costs" material, which Daniel asserted she reviewed, as a trial exhibit, and, of course, I never rejected the offer of such an exhibit. Thus, his contentions that I did so and that I acted inconsistently in receiving GC Exh. 15 make no sense and are without merit. Moreover, noting that, while Daniel asserted, prior to the layoffs of the Celestino Gonzales crew, she examined Respondent's seniority records to confirm that Gonzales was Respondent's least senior operator, counsel for Respondent failed to offer any corroborating documents, one may reasonably doubt his intent to offer any "labor costs" material. In these circumstances, counsel had no basis for citing to Respondent's "labor costs" records in his post-hearing brief, and I have not, and shall not, consider any such citations. Next, I can only admire counsel's chutzpah in suggesting that the record "should" be reopened for me to receive evidence, which, evidently, he neglected to offer during the trial. It is not the function of an administrative law judge to correct the mistakes of counsel during a trial. Finally, while his citation in fn. 30 to a decision, in which the Board concluded that an administrative law judge erred in rejecting an employer's exhibit at trial, is correct, as noted above, Respondent's counsel never offered and I never rejected a "labor costs" exhibit. Therefore, the cited decision is inapplicable herein.

[25] Of the individuals hired between December 1, 1999, and June 30, 2000, 16 remained employed as of September 26. The remainder were hired for periods ranging from a week to 6 months.

[26] Noting that Gonzales called himself a driver, Counsel for the General Counsel notes that, in GC Exh. 15, another employee, Martin Alaniz, who was hired in 2000, is likewise described as a driver. However, contrary to counsel, the exhibit has Alaniz being employed on August 5, 1999, and there is no record evidence that he headed a loading crew.

[27] Daniel testified that each new loader was hired to replace a loader on one of the three remaining loading crews. There is no dispute that neither Martin Gonzalez nor Ricardo Camarena was offered recall when a loader position became available.

January 27, 2000, the Thursday following the January 21 rally and attempted presentation of the employees' petition to Respondent. With regard to their terminations, at the outset, there is no dispute that Respondent regularly conducts monthly[28] safety sweeps.[29] During these so-called sweeps, according to Patrick Kay, Respondent's field superintendents and supervisors "visit job sites and communicate to employees the need to be safe, teach them . . . how to be safe at all times. We pass out recognitions and violations. If the employees are safe, we reward them. If they're not, we write them up for the violations." For the latter employees, "we let them know how serious it is, not only for themselves but for the people around them." Specifically, according to Guardado, the superintendents concentrate upon whether "all the employees use their hard hats, that they use the clamps on the ladders and that they have the guard on their saw." He added that, if he finds such a violation, "I write [it] down . . . and give it to the roofer, and . . . say 'sign it.' And we have to hand it in to the office, and they are the ones that decide it he's going to be [[disciplined].

Alleged discriminatee Camargo testified that, "around a week" after the rally, Guardado arrived at the Silverado Terrace jobsite, at which he was working, conducted a safety check, and gave him a safety warning, telling Camargo he "didn't have the ladder tied down" Camargo, who admitted having received a prior safety warning shortly after being hired, objected to the validity of the warning notice[30] and, after Guardado handed him the warning, refused to sign it, explaining to the superintendent "he didn't feel that it was fair what [Guardado] was doing." Camargo then "asked [[Guardado] . . . if I didn't sign the warning, what would happen to me . . . He said nothing would happen to me, that it was only going to be . . . put in my file." According to Camargo, he was terminated the next day. He was working when he received an instruction to report to Respondent's office and warehouse facility in order to speak to Guardado and Howard. He did so, met Guardado, and they went into Howard's office. The latter spoke, with Guardado translating for Camargo, saying "that I was terminated . . . fired because I didn't sign the warning." Camargo said he hadn't signed because the warning was in English; Howard said "that he couldn't do anything, that I was fired."[31] Alleged discriminatee Ramirez, who, during 1999, sometimes worked as an ordinary roofer and sometimes as a working foreman for Respondent in charge of a roofing crew,[32] testified that, two days before the rally outside of Respondent's Las Vegas office and warehouse facility, he was working with only a helper on a jobsite when Guardado approached and gave safety warning notices to his helper and to him for not having their ladder tied down.[33] Ramirez protested[34] and, when Guardado handed the warning to him, refused to sign it, explaining "that I did have it tied down, but some other people . . . moved it, and they didn't tie it down" and that "it was my second warning in a month." "A few minutes" after Guardado said nothing would happen, Ramirez changed his mind and offered to sign the warning notice, but the former would not permit him to do so. Ramirez further testified that, on the Tuesday after the rally, he arrived at Respondent's office and warehouse facility in order to be given a work assignment and spoke to Steve Howard. "He showed me the paper, and he . . . asked me why I hadn't signed and if I knew what was going to happen, and I said no, and he said, 'I'm sorry, but you're fired."'[35]

Salvador Guardado testified that the two alleged discriminatees both refused to sign their safety warning notices on the same day but on different jobsites. With regard to Camargo, Guardado testified that "he had received a warning before. This had been his second warning, and the violation was because his ladder wasn't tied down and he didn't have a hard hat." Although his coworker did sign a similar safety warning, Camargo refused to sign his warning and became upset, saying "that the company . . . had become more difficult since the Union had been putting pressure on us . . . I started to calm him down, and after I calmed him down, we sat . . . and I started telling him, 'First of all, you have to learn to . . . do your job well' . . . I told him 'First of all, you have to be a roofer or a journeyman and when you do that, then you can start telling me about the Union. This has nothing to do with the Union."' Guardado stated that the foregoing was the only conversation, which he had with Camargo about the Union, and specifically denied telling him it would be futile for him to support the Un-

[28] Due to the holidays, none were conducted in November and December 1999.

[29] There can be no question that safety is of extreme importance to Respondent. Thus, upon being hired, Respondent's roofing employees, who obviously work at significant heights, receive a detailed 16-page booklet, explaining the company's safety policies and procedures, and regular meetings are conducted by foremen. Included in the booklet is a disciplinary procedure for violations of any of the specified policies up to, and including, termination.

[30] The General Counsel does not contest the validity of the warning.

The safety warning notice contains a check next to the line, stating "Failure to utilize personal pro-active equipment (safety glasses, hard hat, or other)." Camargo conceded not wearing his hard hat.

[31] The alleged discriminatee knew of no other employees terminated for refusing to sign a safety warning notice.

[32] Asked how often he worked as a foreman in charge of a roofing crew, Ramirez replied, "It would depend because if there was a job, then I would be foreman, but, if not, I would just work by myself." The record discloses, however, that Ramirez never actually worked by himself but, rather, that he always worked with a helper "because they didn't let us work by ourselves. It was company policy." Asked by me if he was responsible for the helper in the same way he was responsible for a crew, Ramirez admitted, "in the job that we would do between both of us, yes."

[33] The safety warning notice is dated January 26, 2000.

[34] The General Counsel does not contest the validity of the warning notice.

[35] Ramirez testified that, a week later, he returned to Respondent's facility in order to obtain his final paycheck. There, he spoke to Patrick Kay, who was with Howard and another individual and had the final check. Kay "told me that if I took my signature off of the petition . . . he could help me to get back my job . . . I told him that if I had the opportunity . . . I would return . . . he answered a bit mad, saying that . . . he didn't want anybody from the Union bothering the employees there, that if I wanted to be Union . . . I could but not to bother any of his employees." During cross-examination, Ramirez recalled that Kay began the conversation, asking ".me if I was with the Union, and I said yes." While unable to recall any conversations with Ramirez, Kay generally denied ever asking employees if they supported the Union or offering employees the opportunity to return if they opposed the Union or removed their signature from the petition.

ion. However, when reminded that he had previously admitted telling an employee whatever the Union offered probably would not happen, Guardado recalled that he said those words to Camargo after the latter became "relaxed" during their above-described conversation and that he said it "as a friend." As to Jose Ramirez, Guardado said he had been given a prior safety warning and should have known not to do what he did "because he was a foreman." Labeling Ramirez' testimony "not true," Guardado denied that the alleged discriminatee eventually offered to sign his safety warning notice. He added that Camargo and Ramirez are the only employees, who have ever refused to sign safety warning notices and that, on that same day, January 26, he gave safety warnings to 10 other roofing employees, each of whom signed his warning. Answering a leading question, Guardado opined that the alleged discriminatees refusals to sign their safety warnings indicated to him that they were unconcerned about safety, and at the same time they acted contrary to what the safety policies of the company are."

Asked if he informed Steve Howard about the conduct of Camargo and Ramirez, Guardado testified that he did so the next morning. He was bringing the safety warning notices to Howard's office in order to show them to Howard, and, upon entering the latter's office, he heard Howard speaking on the telephone to Patrick Kay. "Steve asked me how many violations I had given, and I told him how many I had given. Then, Steve told Pat Kay, and [Kay] told him to put on the speaker phone . . . I told [Kay] that I had given out 12 violations and, of the 12, two of them had refused to sign, and Pat Kay said that's insubordination. He said that the employees who are insubordinate and don't want to sign the violations should be terminated. So he told me to call them."[36] Thereupon, Guardado spoke to Ramirez and asked him to return to the office and asked Camargo's job superintendent to have him return to the office. According to Guardado, he was present when Howard spoke to each alleged discriminatee, saying he was letting him go because, by refusing to sign his safety warning notice, he had engaged in "insubordination."

Patrick Kay's testimony reveals a different version of events. According to him, one afternoon in January, he was in his office in Irvine, California when he received a telephone call on his cellular phone from Sal Guardado regarding a safety sweep that day. "He called me regarding employees refusing to sign the violations." Guardado said that "a few" employees refused to sign, and "he named the employees at that time." Also, "I recall him saying . . . others had signed violations, but . . . they refused to sign the safety violations and that was their second violation."[37] Kay testified, "I told Sal to talk to them and let them know that they're not going to lose their jobs. It's just a part of us educating them a little further on their . . . safety practices . . . and that it is company policies to acknowledge these violations." Then, according to Kay, "later in the evening," while at the office, he again received a telephone call from Guardado on his cellular telephone. Guardado said "that they refused to sign . . . the document and basically were insubordinate . . . Sal had mentioned to me how disrespectful they were and they refused to sign [the violation notice . . . and . . . I told Sal that they're insubordinate and if they don't sign . . . he needs to let them go."[38] Denying that the roofing employees' petition entered his mind, Kay said his concern was that "two employees . . . were basically not going to follow our safety policies procedure and being disrespectful to a superintendent." During cross-examination, asked how the employees were disrespectful, Kay stated, "just the way that they came across to Sal the second time, when Sal went and asked them . . . about signing it" and that he relied entirely upon Guardado's version of events in concluding that the employees had been insubordinate but could not recall what the employees had said.[39] Further, asked what he considered the insubordination to have been, Kay said "both" the refusals to sign and what they said to Guardado—"It was . . . the lack of respect for a supervisor." Also, Kay conceded that there is no policy or practice in place and that employees are just expected to sign safety warning notices. Finally, with regard to Kay's testimony, Guardado specifically denied the former's version of the events leading to the discharges of Camargo and Ramirez—"The only time I spoke to him, it was on the next day, on the speaker"—and, contradicting Kay, not only stated that it was Kay who first characterized the conduct of the alleged discriminatees as insubordination but also averred he "didn't even know that was called insubordination." Further, while stating that each argued with him regarding the necessity for a safety warning, Guardado conceded that neither alleged discriminatee said anything of a personal nature to him

Although not involved in the decisions to terminate Camargo and Ramirez, Cheryl Daniel defended Respondent's actions on grounds that "safety is so important at Davey Roofing" and "failing to acknowledge safety rules by not signing the document puts employees and our company at risk." In this regard, however, Respondent's safety policies and procedures manual neither contains a requirement that employees sign safety warning notices nor sets forth a punishment for their failure to do so. Further, General Counsel's Exhibit 10 consists of several examples of Respondent's implementation of its progressive disciplinary policy. Daniel pointed out that two such disciplinary actions involved termination. The first concerned an employee, Rosa Martinez, who, after paychecks had been stolen the previous pay period and after being instructed by her supervisor to keep paychecks "under lock and key" when away from her desk, replied "that her method had always worked in the past" and asked her supervisor "if she would like to pass out the checks herself." According to Daniel, "Rosa Martinez was terminated for insubordination," and she acted "in a defiant manner." Daniel added that both her negligence and her attitude were factors in Martinez' termination. Daniel also pointed to another individual, Jose Rodriguez, who had been discharged by Respondent—"He was terminated because he tested positive

[36] Asked what Kay believed was the insubordination, Guardado replied, the "refusal to sign."

[37] According to Kay, he recognized the names but could not picture them, and was unable to recall the names while testifying.

[38] Kay testified that Guardado placed his telephone calls to him on his own cellular telephone, which he carries with him to jobsites.

[39] Kay conceded that what the alleged discriminatees said must have been quite serious.

on a random drug screen." However, General Counsel's Exhibit 10 also contains examples of employees, who were disciplined harshly but not terminated for what appear to be serious acts of misconduct. Thus, an employee who ignored "specific instructions from a supervisor, which conduct resulted in damage to relations with a customer, was suspended but not terminated; an employee who "used abusive language" while communicating with fellow employees and, subsequently engaged in "fighting" with fellow employees was suspended but not terminated; and an employee who committed "gross misconduct" by "misuse of material purchasing and shipping privileges and solicitation of employees and customers . . . for interests other than those of [Respondent]" was suspended but not terminated. Daniel did agree that ignoring a supervisor's direct order constituted insubordination.

Next, Respondent argues that, inasmuch as each was a supervisor within the meaning of Section 2(11) of the Act, the discharge of alleged discriminatee, Jose Ramirez, and the layoff of Celestino Gonzales were not unlawful. Initially, there is no dispute that Ramirez sometimes worked as a working foreman for Respondent and in charge of a roofing crew[40] or that Gonzales was an operator for Respondent and in charge of a loading crew.

General Counsel's Exhibits 8(a) and (b) set forth the responsibilities of a foreman for Respondent, dividing them into five distinct areas—safety, labor, material, equipment, and quality, and Patrick Kay testified that the documents fairly and accurately reflect the duties and responsibilities of the foreman position. With regard to safety, a foreman schedules and holds safety meetings each week, enforces all of Respondent's safety policies and procedures, informs superintendents of unsafe conditions, and reports all safety-related incidents. Regarding labor, a foreman is responsible for checking with the builder's superintendent each morning, the daily performance of the employees on his crew, informing a superintendent if he requires additional personnel to perform the required work, ensuring that each member of his crew is qualified to perform all required work and is producing work which meets Respondent's standards, completing evaluations of new employees, ensuring the employees on his crew work 40 hours per week, five days a week, turning in accurate pay sheets for the employees on his crew, and ensuring that each employee's weekly timekeeping record is accurately completed by the employee and initialed by the foreman. As to material, the foreman is responsible for ensuring that his crew has enough material, that the material is not being abused, that the material is not defective, and that only material, which should be on the ground, is properly there. Next, the foreman is responsible for ensuring that his crew has the proper equipment and that such is operating properly. Finally, the foreman is responsible for ensuring that all work is of the highest quality, meets Respondent's aesthetic expectations, and conforms with Respondent's policies and procedures.

Patrick Kay, who admitted that General Counsel's Exhibits 8(a) and (b) fairly and accurately reflected the duties and responsibilities of a foreman for Respondent and who claimed to be familiar with alleged discriminatee Ramirez and "I'd recognize him if I saw his face," testified that Ramirez' job function[41] was "to supervise the employees on the job site that he [[was] managing" and that his job involved "time keeping, safety, keeping the job on track as far as production schedule." With regard to hiring, according to Kay, Ramirez had "access" to other roofers, "and . . . numerous times they bring in employees."[42] Further, while Kay stated Ramirez had authority to grant time off to employees on his crew, he would have done so "through communicating with the supervisor." Kay then testified he is also familiar with Celestino Gonzales, also believing him to be a foreman. Kay stated that he is familiar with Gonzales' job duties as the were the same as those of Ramirez, and "our foreman's job duties don't switch from job to job. Our foreman's job duties go straight across the board."

Salvador Guardado generally testified that a roofer foreman "fills out the time sheets. He takes material to the houses . . . . He has . . . to deal with the safety of the crew. And also the communication between him and the superintendent . . . because that way the superintendent can get in touch with him as to work."[43] Specifically regarding Ramirez, as to hiring, he could not hire but he could recommend, "and he did it like many others." Guardado recalled that, since he became a superintendent, Ramirez recommended "around eight to ten individuals," including his brother, his cousin, and Ramon Medina, each of whom he hired based on Ramirez' word that they needed work "because they had already worked with our company." As to others, whom Ramirez recommended, "we would have interviewed them to see how much they knew and, depending on what they know, we would have given them the job." As to transferring personnel, "whenever a foreman has too many workers, he tells the superintendent . . . and they're transferred to another job." It is the superintendent who decides the location and the new crew. While Ramirez had no authority to suspend an employee, who paid no attention to instructions, he had authority to send the employee to the office; however, Guardado could think of no instances when Ramirez sent employees to the office for discipline, and, if an employee has been sent to the office, "they ask him questions." Ramirez possessed no authority to lay off employees, to recall employees, to discharge employees, to recommend the discharge of employees, to promote employees, or to reward employees.[44]

[40] Whether Ramirez was acting as a working foreman at the time of his discharge is not, at all, clear. Thus, he testified, without contradiction, that, during the last week of January 2000, he was working only with a helper and was not in charge of a roofing crew. While Ramirez conceded that his responsibility for his helper was identical to whenever he was in charge of a crew, there is no record evidence as to the extent, if any, of his supervisorial authority over his helper.

[41] At no time did Respondent refute Ramirez' contention that "sometimes I would work by myself" and "sometimes I would be in charge of a group or a team."

[42] Apparently, Respondent maintained an employee referral bonus program, encouraging new hires to refer other qualified candidates for hire. Kay was not aware of any employees, whom Ramirez may have referred to Respondent for hire.

[43] Apparently, roofer foremen carry radio telephones for communication purposes.

[44] Guardado testified that roofer foremen were able to recommend awards but could not think of anything Ramirez did in this regard.

However, according to Guardado, a roofer foreman, such as Ramirez, has authority to train another employee to perform the foreman's job duties and, then, to recommend the employee's promotion.

Thereupon, a superintendent will wait until a tract becomes available to determine "if he can do the job as a foreman." Guardado testified that he takes the foreman's word that the employee is ready for promotion; that Ramirez recommended the promotion of his brother; and that the latter was promoted to foreman.[45] Regarding the assigning of work, Guardado conceded that a roofing crew's work is repetitive on a day-to-day basis and that Ramirez and other foremen merely instruct their crews upon which house they are supposed to be working. However, a foreman may use his discretion in deciding which employees should work on particular houses.[46] Moreover, Ramirez and other roofer foremen are authorized to permit employees to leave work early "because you work piece work," and workers don't call Respondent if they will be absent due to illness "since they're paid by the piece, if the house isn't finished, it could sit there for two or three days, and they're not going to be paid." Finally, with regard to pay for foremen, in addition to their normal wages, Respondent's foremen receive a weekly "job end" bonus. While the amount is unclear,[47] Kay estimated it ranged between $65 and $100 per week.

The record is not clear as to how often Jose Ramirez worked as a roofer foreman for Respondent. According to the alleged discriminatee, since 1992, he "sometimes" worked as a foreman; however, when asked by me to specify, he first replied that he did so "only in two" jobs but later said whether he would work as a foreman "would depend" upon the size of the job.[48] Testifying with regard to his supervisorial authority as a foreman during direct examination,[49] Ramirez, who admitted being responsible for safety on jobsites, denied being authorized to hire, fire, or to recommend such, to transfer workers, to suspend or send workers home early, to grant time off, or to promote. During cross-examination, he stated that Steve Howard spoke to him in 1992 about his foreman responsibilities, explaining "that I had to take the material, that I had to give the hours of the people that were working." and that he had to tell the workers on his crew what jobs to do "after Steve ordered me" to do so. Asked if he could decide which employees would do the assigned jobs, Ramirez said, "I didn't have to designate a certain job because everybody did the same . . . most of the time, and we were always within the same area." Also, "I had to check the work, and if something was done wrong and the person was there, I would tell them to go back because it was my responsibility to have the job done well." While denying authority to hire or to recommend hiring, Ramirez testified that two relatives did work for Respondent but denied any role in their hiring. With regard to his brother Alvaro, the alleged discriminatee stated that, in 1992, Alvaro did ask him if work was available and that he sent Alvaro to Respondent's office where "I think he spoke to [Steve Howard], and . . . he did get the job." Ramirez denied speaking to Howard in his brother's behalf and stated that Alvaro was rehired by Respondent in 1996 or 1998 but that he had no role in this as "they already knew him." He reiterated that he was not authorized to send someone home for bad work, and, while Howard said he had such authority, "we never employed it." Members of his crew would "sometimes" inform him that it was necessary they leave work early, "but when I wasn't there, they would just leave. They didn't have to tell me anything."[50] Further, during cross-examination, while admitting he received a weekly bonus as a foreman[51] and had use of a company radio, Ramirez denied possessing authority to promote or to recommend promotions or to give or recommend the giving of raises to employees.

Counsel for Respondent sought to impeach Ramirez' credibility with regard to his authority as a foreman by confronting the alleged discriminatee with his pretrial affidavit wherein he stated:

> I was employed as a foreman for Davey. My job involved supervising other employees and working with them. I supervised anywhere between one to 10 employees, depending upon how much work was assigned to me. In performing my supervisor duties, I assigned the employees under me what job they had to do. I maintained their time cards. If an employee had to leave early for a doctor's appointment or for another reason, I had the authority to grant him time off. I had

[45] Counsel for the General Counsel asserted that I "improperly denied" his request to voir dire question Guardado as to whether he was testifying to his personal knowledge regarding the promotion of Ramirez' brother. While such questioning is, of course, proper, a judge, including an administrative law judge, has discretion as to whether such will be permitted. Here, counsel for the General Counsel's request came after the witness answered that Ramirez' brother had been promoted, and, in denying his request, I informed counsel that he had the right to go into any aspect of Guardado's testimony, including his personal knowledge of the events about which he testified, during cross-examination. During cross-examination, counsel for the General Counsel asked Guardado just one question—did he promote Ramirez' brother. The witness answered, "I don't think so," and counsel obviously believed he had established his point regarding Guardado's personal knowledge. In these circumstances, I fail to understand the basis for counsel's assertion that he was "improperly denied" the right to engage in voir dire questioning of the witness.

[46] For example, clay tile is much more difficult to lay than "barrel tile."

[47] Guardado calculated it as being 15 percent of every $100 earned by the foreman's crew.

[48] As stated above, when not working as a foreman, Ramirez perform roofing work, and he would always have a helper working with him. On these occasions, the helper would be responsible for completing his own time records, and Ramirez would not be required to initial or sign these. Ramirez testified that he worked by himself during December 1999 and January 2000, and Respondent offered no contrary evidence.

[49] As a foreman, Ramirez spent 90 percent of his time working along with his crew.

[50] In such a circumstance, Ramirez "would just tell the supervisor Steve, and he would send somebody else." Apparently, under the piece rate system, under which Respondent's employees worked, they were only paid for the work they performed. Thus, when an employee left the job for any reason, he was not compensated for any lost worktime.

[51] Ramirez said this bonus was compensation for driving from job to job.

> granted time off to employees in the past. I had the right to verbally discipline employees, and I also had the authority to send them home if they failed to perform on the job. I know I had this authority because . . . Steve Howard told me I had it at the time he appointed me the foreman.

Asked if was true he had authority to grant time off if employees had to leave early, Ramirez first testified "But I had to ask Steve first if he authorized it" and, later, testified "Steve told us that only in an emergency I could do it something happened, but nothing ever happened." He then contradicted himself, stating he had granted time off "like when somebody had to go to court on a traffic ticket or something" and he was required to "advise" the superintendent "before I did it." Ramirez further testified with regard to employees, who left work early, "it wasn't time off because we were working by the piece." Finally, he conceded being authorized to discipline employees, including sending them home, "but it never happened."

Celestino Gonzales testified that, as an operator and as the leader of a loading crew, he had no authority to hire, to fire, to transfer, to promote, to discipline, to assign work ("We worked as a group . . . or as a team"), to reward, or to remedy grievances. During cross-examination, while stating that, rather than towards the employees on his crew, his responsibilities went only to the job itself, he conceded "I was in charge of [telling the other employees the location of their work, the tile to be used, and the color]." Further, he denied telling the employees, who were on his crew, what or how to do their work—"They already knew their jobs . . . they knew what they had to do."

However, he conceded that he was required to check the work of his crew—"I would go up and check that the tile was enough tile for the house" and "I would have to check the paper, check the number . . . and go back and get more" tile.[52] Also during cross-examination, Gonzales denied being authorized to transfer or recommend transfers, to suspend or recommend suspensions, to lay off or recommend layoffs, to recall or recommend recalls, to promote or recommend promotions, to fire or recommend discharges, or to hire or recommend hiring.[53] In the latter regard, Gonzales conceded informing Martin Gonzalez to fill out a job application and that Gonzalez was hired by Respondent.[54] Finally, while conceding that Respondent equipped him with a radio telephone and that he was responsible for keeping the time records for members of his crew, Gonzales denied receiving bonus payments, which other employees did not also receive—"I only received one bonus of $10, once only, because supposedly we were good workers." On this point, he denied receiving a bonus at the end of a job and, when asked if he received more pay than others on his crew, replied, "My helpers, they received 33 percent, and I would receive 34 percent, just one percent more."[55]

B. Legal Analysis and Conclusions

Initially, I shall discuss and analyze the alleged violations of Section 8(a)(1) of the Act. In the complaint, the General Counsel alleges that Salvador Guardado's attempt to attend a scheduled meeting between agents of the Union and several of Respondent's residential roofers at the former's meeting hall on or about October 27, 1999, constituted unlawful surveillance of Respondent's employees' activities in support of the Union. In this regard, there is no dispute that, having become aware of the date, time, and location of the meeting from a union flyer, Guardado arrived at the Union's hall in his truck a few minutes before the scheduled start of the meeting, parked in the parking lot where he encountered Antonio Diaz. Guardado said the flyer was an invitation for Respondent's employees to attend a meeting there with union agents, he was an employee, and he wanted to attend. Diaz replied that the meeting was not for superintendents or supervisors and that Guardado would not be permitted to attend. Thereupon, Guardado turned, walked back to his truck, and drove away. Several employees were standing nearby during the incident, and Guardado admitted recognizing alleged discriminatee, Jesus Camargo. In asserting that Guardado's actions were violative of Section 8(a)(1) of the Act, counsel for the General Counsel relies on *Porta Systems Corp.*, 238 NLRB 192 (1978), in which the Board concluded that attendance at four separate meetings between union agents and the respondent's employees by three company leadpersons, each of whom possessed statutory supervisorial authority, constituted unlawful surveillance. Arguing to the contrary, counsel for Respondent relies on a Board decision, decided 6 weeks prior to the above decision—*Osco Drug, Inc.*, 237 NLRB 231 (1978). In *Osco Drug*, a statutory supervisor attended a union meeting held at a hotel. Employees recognized the supervisor and, while requesting that he not report to management officials about what he observed, a union agent did not request that he leave. Inasmuch as his presence was open and as he was not requested to leave and as the union's organizing campaign was not a secret, the administrative law judge, whose decision was adopted by the Board, was "unwilling to find surveillance by the mere presence of" the supervisor at the meeting. Id. at 234. Noting that Diaz refused to permit Guardado to attend the meeting and that the latter complied and immediately departed, I do not believe that Guardado's attempt to attend a meeting, which had been overtly publicized by the Union, during an undisguised organizing campaign, constituted unlawful surveillance. In these circumstances, *Osco Drug*, supra, appears to be the applicable precedent, and I shall recommend that paragraph 6(a) of the complaint be dismissed.

The General Counsel next alleges in the complaint that Respondent violated Section 8(a)(1) of the Act by informing its employees that it would be futile for them to support the Union

[52] Gonzales initially stated that his superintendent, Uribe, would "often" check on his crew's work, stating this would be "every day for "more or less around half an hour." Moments later, he added that Uribe would "always" be at the jobsite but would not always be checking his crew's work.

[53] In his posthearing brief regarding Celestino Gonzales' supervisory authority, counsel for Respondent asserts that the former recommended 8 to 10 individuals who were hired, that at least three employees were recalled based on his recommendation, and that he effectively recommended the promotion of his own brother to a foreman position. There is no record evidence supporting any of these assertions.

[54] Martin Gonzalez corroborated his uncle on this point but denied that he disclosed their relationship at the time of his hire or that Celestino recommended Martin for a loader job.

[55] The percentage was "of what we did in a week."

and by threatening them with suspension and discharge for supporting the Union. With regard to these allegations, while Jesus Camargo and Salvador Guardado each appeared to be a generally frank and trustworthy witness, as compared to Camargo, Guardado was the more impressive witness and I am unable to credit the former's antipodal testimony on these points. Thus, while testifying that, on one occasion in Respondent's office, Guardado approached and, in the presence of other employees, told him "that the Union wasn't good and that the benefits weren't any good either" and, on another occasion in Respondent's office, while he was conversing with other employees about the Union, Guardado approached and told him "not to go to the meetings because we could be suspended or fired," Camargo was effectively impeached by his pretrial affidavit wherein he combined these two comments into one conversation at a jobsite rather than separate conversations at Respondent's office. Further, during cross-examination, he later contradicted himself as to the second comment, stating he was alone when Guardado approached him. By the foregoing, I am convinced that neither of the alleged conversations occurred; however, Guardado admitted that he did have one conversation with Camargo about the Union—on January 26, 2000. Thus, after he gave the alleged discriminatee his safety warning and after Camargo accused Respondent of becoming "more difficult" upon the advent of the Union's organizing campaign, "as a friend," Guardado informed Camargo "maybe what the Union was offering wasn't really what was going to happen." While counsel for Respondent contends that Guardado's comment was merely "an informational statement of opinion," counsel for the General Counsel argues that what he said was intended to convey to Camargo and, presumably, to other employees the futility of supporting the Union as their collective-bargaining representative. I agree with counsel for Respondent. The decisions of the Board, on which counsel for the General Counsel relies (*API Industries,* 314 NLRB 706 (1994); *Jennie-O Foods,* 301 NLRB 305 (1991); and *Jones Plumbing Co.,* 277 NLRB 437 (1985)), concern statements, such as "If I want, we will never reach an agreement" and "[respondent] would never agree to anything that the union would try to negotiate with them," which intentionally warn of the futility of seeking union representation. In contrast, expressed in terms of "maybe," lacking words denotive of finality or definity, and absent accompanying threats of reprisal or promises of benefits, Guardado's comment seems clearly to have been an innocuous statement of opinion as to what might result from negotiations between Respondent and the Union. Further, there was no suggestion or implication that Respondent would not negotiate in good faith with the Union if duly recognized or certified. As such, Guardado's expressed opinion was privileged by Section 8(c) of the Act. In the foregoing circumstances, I shall recommend the dismissal of paragraphs 6(c)(1) and (2) of the complaint.

The complaint alleges that Steve Howard and Salvador Guardado each unlawfully interrogated employees regarding their union membership, activities, and sympathies. As to the allegation pertaining to Howard, while the latter failed to appear at the hearing in order to deny what was attributed to him during direct examination, Jose Ramirez, whose demeanor, while testifying, was not that of a particularly veracious witness and who exhibited only a modicum of probity, testified inconsistently. He initially asserted that, in early January 2000 in Howard's office, the latter asked "if I was involved with the Union," to which he replied "that I was thinking about it." Later, during cross-examination, Ramirez changed his testimony, declaring that Howard asked "if I was going to the Union meetings, and I said no." Likewise, with regard to the allegation pertaining to Guardado, while the latter, who, in contrast to Ramirez, was an straightforward witness, generally, but not specifically, denied what was attributed to him, Ramirez testified inconsistently. He initially testified that, on or about January 24, 2000, in Respondent's office, the latter "asked me if I supported the Union," and that he said he was thinking about it. During cross-examination, the alleged discriminatee changed his testimony, stating, "He was asking me if I supported the Union, if I agreed with them." Notwithstanding that Howard failed to testify at the hearing and deny what was attributed to him by Ramirez and that Guardado did not specifically deny what was attributed to him by Ramirez, given my impression that he was not an entirely candid witness and his discordant versions of the same conversations, I am not confident that Ramirez was forthright concerning his purported conversations with Howard and Guardado and can not rely upon his testimony. In these circumstances, I shall recommend that paragraphs 6(b) and (d) of the complaint be dismissed.

However, I conclude that there is merit to the allegations of paragraph 6(e) of the complaint—that Respondent, through Patrick Kay, violated Section 8(a)(1) of the Act by interrogating employees concerning their union membership, activities, and sympathies and by offering reemployment with Respondent to discharged employees if they abnegated their support for the Union. Jose Ramirez also testified with regard to these allegations, and, while I do not view him as being entirely reliable, as compared to Patrick Kay, he was a more sincere witness. Kay's demeanor, while testifying, was that of an inherently disingenuous witness, one not worthy of belief or reliance. Moreover, of course, Kay was unable to recall any conversations with Ramirez and only generally, and not specifically, denied what was attributed to him by the alleged discriminatee. Accordingly, I find that, a week after his discharge, Ramirez returned to Respondent's office in order to obtain his final check and spoke to Kay, who, after initially asking Ramirez if he "was with the Union," told him "if [he] took [his] signature off of the petition . . . he could help [Ramirez] to get back [his] job." Assuming that the alleged discriminatee was an employee and not a supervisor, within the meaning of Section 2(11) of the Act,[56] Kay's latter comment was blatantly unlawful. Thus, the Board has held that an employer may act in violation of Section 8(a)(1) of the Act by its comments to unlawfully laid off or former employees and by making job offers to applicants for employment conditioned said individuals quitting their union. *Culley Mechanical Co.,* 316 NLRB 26 at 26 (1995); *Honda of Hayward,* 307 NLRB 340, 349 (1992); *Nissen Foods (USA) Corp.,* 272 NLRB 371 (1984). Moreover, an offer of reinstatement to an unlawfully discharged employee conditioned upon

[56] I shall discuss this issue infra.

cessation of his union activities is not a bona fide offer of reinstatement. *Romal Iron Works Corp.*, 285 NLRB 1178 fn. 1 (1987). Therefore, by conditioning reinstatement upon Ramirez' recantation of his support for the Union, Kay acted in violation of Section 8(a)(1) of the Act. Further, while, given his signature upon the residential roofing employees' January 21 petition, Ramirez was an overt supporter of the Union, as Kay was a high-ranking management official and his opening question to Ramirez was accompanied by an unlawfully-imposed reinstatement condition, Kay's question must be viewed as unlawful interrogation, violative of Section 8(a)(1) of the Act.

I next consider the alleged unlawful layoffs of Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena and the alleged unlawful discharges of Jesus Camargo and Jose Ramirez. In this regard, Board law in 8(a)(1) and (3) cases is well settled. Thus, as explained by the Board in *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to set forth a violation under Section 8(a)(3) of the Act, the General Counsel is required to show by a preponderance of the evidence that antiunion animus was a motivating factor in Respondent's conduct. Once this showing has been made, the burden shifts to Respondent to demonstrate that the same action would have taken place in the absence of or notwithstanding the employees' activities in support of the Union. To sustain his initial burden, that of persuading the Board that Respondent acted out of antiunion animus, the General Counsel must show (1) that the employees were engaged in union activities; (2) that Respondent was aware of or suspected the employees' involvement in activities in support of the Union; and (3) the employees' activities in support of the Union were a substantial or motivating factor for Respondent's actions. Such motive may be demonstrated by circumstantial evidence as well as by direct evidence and is a factual issue. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg 314 NLRB 1169 (1994). Four points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not "quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act." *Wright Line*, supra at 1089 fn. 4. Second, once the burden has shifted to Respondent, the crucial inquiry is not whether Respondent could have engaged in its alleged unlawful acts and conduct but, rather, whether Respondent would have done so in the absence of the alleged discriminatees' support for the Union. *Structural Composites Industries*, 304 NLRB 729 (1991); *Filene's Basement Store*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (*Wright Line*, supra at 1089 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Anderson & Co.*, 291 NLRB 39 (1989). Finally, as to the latter point, "it is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Flour Daniel, Inc.*, 304 NLRB 970 at 970 (1991); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

In my view, counsel for the General Counsel has met its burden of proof and established that antiunion animus was the motivating factor in its decisions to lay off Gonzales, Gonzalez, and Camarena and to discharge Camargo and Ramirez. Thus, each of the alleged discriminatees, including Camarena, appears to have been a supporter of the Union and attended union meetings. In addition, Gonzales, Gonzalez, Camargo, and Ramirez participated in the roofing employees' rally outside the Las Vegas office and warehouse facility on January 21, and the signature of each alleged discriminatee, including that of Camarena, is on the roofing employees' petition, which was given to Respondent on January 21, 2000. Respondent's knowledge of the contents of the petition is clear. On this point, there is no dispute that, on January 21, the Union sent a copy of the petition, by facsimile, to Respondent's Las Vegas office; that a copy of the petition was sent from Respondent's Las Vegas office to its corporate office in Irvine, California; and that, at the latter location, officials, including Tim Davey, Patrick Kay, and Cheryl Daniel,[57] closely reviewed and discussed the document on the following Monday. The timing of Respondent's layoff of the entire Celestino Gonzales loading crew on that very Monday afternoon is redolent of unlawful animus. The Board has long held that adverse employee actions, which occur immediately after conspicuous union activity, are clear indicia of unlawful animus. *Standard Sheet Metal, Inc.*, 326 NLRB 411 (1998) (unlawful animus inferred from a suspension given 1 day after the discriminatee argued with his supervisor about a union); *Norman King Electric*, 324 NLRB 1077 at 1077 (1997) (unlawful animus inferred from the fact that the discriminatees were let go "only after they had engaged in protected picketing"); *Best Plumbing Supply*, 310 NLRB 143 at 143 (1993) (unlawful animus inferred from the fact that the discriminatee was terminated 30 minutes after he "took issue" with a supervisor's statements at an employee meeting during which company officials expressed opposition to a union); and *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992) (unlawful animus inferred from the fact that the discriminatees were terminated 1 day after their attendance at a union meeting). Further, given the utterly contradictory nature of Respondent's defense, as set forth below, what I view as the pretextual nature of the discharges of Camargo and Ramirez is likewise clearly suggestive of unlawful animus. Also demonstrative of Respondent's antiunion animus was the unlawful condition, which Patrick Kay placed upon his offer of reinstatement to Jose Ramirez—that the alleged discriminatee remove his signature from the Las Vegas residential roofing employees' January 21 petition.

Regarding the layoffs of Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena, the burden shifted to Respondent to establish that it would have laid off the three alleged discriminatees notwithstanding their support for the Union. Re-

[57] Daniel's demeanor, while testifying, was that of a mendacious witness. In my view, she testified in a manner calculated to buttress Respondent's defenses to the allegations of the complaint rather than truthfully. In short, as with Kay, her testimony is not worthy of belief.

spondent asserts that the three members of Celestino Gonzales' loading crew were laid off due to a decline in work. At the outset, while Patrick Kay admitted that Steve Howard, who is no longer employed by Respondent and who did not testify at the hearing, made the decision to lay off the three alleged discriminatees without any input from him, Cheryl Daniel contradicted him, asserting that Kay himself told her he was going to be laying off the employees, and, despite being reminded about his admission, did not retract her assertion. Moreover, Respondent's proffered testimony, regarding an asserted slow down of available work, was inconsistent and uncorroborated. At first asked if, during 2000, there had been a slow down in the available work for loaders, Kay replied, "No. It was steady." Immediately thereafter, he contradicted himself when asked if he recalled the layoff of a loading crew—"I'm not sure of the month, but it was a slow time. It was when we slowed down." Subsequently, he sought to palliate his prior testimony—deceitfully, in my view, stating that he had "misunderstood" what he had originally been asked and that what he meant was there had been no change in the availability of work since the layoffs. Cheryl Daniel testified that Kay informed her that the work slow down occurred during February 2000; however, Kay failed to corroborate her on this point. Further, Respondent offered no corroborating documentation, establishing a slow down in work either generally throughout the Las Vegas area or specifically at the Red Rock housing development. In the instant fact circumstances, the significance of this omission can not be overstated, for, as another administrative law judge wrote, "one reasonably would expect some independent corroborating proof of the Respondent's extraordinary conditions in its business that would necessitate layoffs." *Power Equipment Co.*, 330 NLRB 70, 76 (1999). Indeed, the Board has held that it is "incumbent" upon an employer, who asserts an economic defense, to proffer more than oral testimony. *Reeves Rubber, Inc.*, 252 NLRB 134, 143 (1980). In addition, in the absence of Steve Howard, the only evidence, concerning the availability of work at the Red Rock job site, is found in the respective testimony of Celestino Gonzales and Martin Gonzalez, each of whom appeared to be testifying in a frank and forthright manner. According to the former, when Howard informed him of the layoffs on January 24, his crew had been working "six or seven days per week" and between 8 and 10 hours each day and had just worked the entire weekend. Also, preparatory roofing work was being finished on many houses, and no one previously had mentioned to him the possibility of a layoff. Likewise, Gonzalez testified that, at the time of his layoff, six houses were ready for the placement of roofing materials, enough work for a week or two, and numerous houses were in the construction process. Next, both Kay and Daniel testified that seniority is a factor in layoffs and that, inasmuch as the Celestino Gonzales loading crew had the least seniority of the four Las Vegas area loading crews, the three alleged discriminatees were selected for layoff; however, as above, no corroborative documentation was offered and it does not appear that the signatures of any of the remaining three operators appears on the January 21 petition. Finally, while it is true that, subsequent to the layoffs of Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena through September 2000, Respondent utilized one of its existing loading crews to perform its loading work at the Red Rock jobsite, no operator had been hired to replace Celestino Gonzales, and not until June 15 did Respondent hire another loader, it is also true that no less than 74 residential roofing employees were hired by Respondent on a full-time or temporary basis during the period December 1999 through September 2000; that three new loader employees were hired during the summer 2000 and Respondent offered no documents corroborative of Daniel's assertion they replaced employees on the three existing loading crews; and that, during the time period October 1999 through the date of the hearing, approximately 40 roofing employees, other than those classified as operators and loaders, performed loading work and were compensated for such work. Based on the foregoing, it is clear, and I find, that Respondent has failed to meet its *Wright Line*, supra, burden of proof that it would have laid off Gonzales, Gonzalez, and Camarena notwithstanding their support for the Union.

With regard to alleged discriminatees Camargo and Ramirez, Respondent's purported defense to their alleged unlawful discharges is based on the respective testimony of Salvador Guardado and Patrick Kay; however, their attestations, concerning Respondent's putative decision-making process and of its rationale underlying the discharges, are utterly antithetical in nature and not worthy of belief. Thus, as to the former, Guardado testified that, the day after each alleged discriminatee had refused to sign his safety warning notice, he spoke to Kay one time over a speaker-phone in Steve Howard's office and merely told Kay he had given out 12 violations and "two of them had refused to sign" and that Kay characterized this as insubordination and instructed Guardado to terminate the employees. In contrast, Kay testified that, on the day of the safety sweep, Guardado twice telephoned him at his office on his cellular phone from a jobsite; that, during their first conversation, Guardado informed him a "few" employees had refused to sign their warning notices and named them, and he instructed Guardado to inform the employees their jobs were not in jeopardy and it was just company policy for them to acknowledge receipt of the warnings; that, during their second conversation later that day, Guardado told him the employees again had refused to sign their warning notices and were exhibiting an "insubordinate" and "disrespectful" attitude toward him; and that he agreed such was insubordination and instructed Guardado to discharge the employees.[58] Further, while Guardado, who denied the occurrence of Kay's sequence of events and denied first characterizing the alleged discriminatees' respective behavior as insubordinate, quoted Kay as saying that the alleged discriminatees' "insubordination" was the refusal of each to sign his safety warning notice and conceded not even knowing such behavior could be termed insubordination, Kay testified[59] that each alleged discriminatee's insubordination was mani-

[58] Corroborative of my view that Kay was dissembling was his inability to explain how the employees had acted insubordinately. He averred that he was relying upon what Guardado told him.

[59] Kay, who insisted employees are just expected to do so, conceded that there is no policy or practice, requiring employees to execute safety warning notices.

fested in two ways—his refusal to execute the warning notice and what he said to Guardado. Moreover, while Guardado denied that either alleged discriminatee made any derogatory comment of a personal nature to him, Kay insisted that what he found insubordinate was their "lack of respect for a supervisor."[60] In these circumstances, one may only conclude that Respondent's asserted defense for the terminations of alleged discriminatees, Camargo and Ramirez, was nothing but a canard—a pretext designed to obfuscate Respondent's actual motivation—its unlawful animus toward its Las Vegas residential roofing employees who supported the Union.

I turn now to Respondent's contentions that Jose Ramirez and Celestino Gonzales were not employees but rather supervisors within the meaning of Section 2(11) of the Act. As to their status as statutory supervisors, I note, at the outset, that the burden of establishing that an individual is a supervisor within the meaning of Section 2(11) of the Act rests on the party--herein, Respondent—who asserts supervisory status. *Hausner Hard-Chrome of Ky, Inc.*, 326 NLRB 426, 427 (1998). Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature but requires the use of independent judgment.

The statutory indicia quoted above are to be read in the disjunctive; as stated by the Board in *Great American Products*, 312 NLRB 962 at 962 (1993), "an individual may be deemed a supervisor within the meaning of [the above provision] if it is shown that he or she possesses the authority to engage in any one or more of the functions enumerated there and uses independent judgment in exercising such authority." Further, an individual, who is alleged to be a supervisor, must exercise his or her authority in the interests of the employer, and "performance of those functions in a merely routine, clerical, perfunctory, or sporadic manner will not suffice." *Nursing Center at Vineland*, 318 NLRB 901, 904 (1995); *Great American Products*, supra. By the foregoing, Congress meant to ensure that only individuals, who are vested with "genuine management prerogatives" are included within the definition, and "the Board must judge that the record proves that an alleged supervisor's role was other than routine communication of instructions between management and employees without the exercise of any significant discretion." *Great American Products*, supra; *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). Moreover, while an employer ostensibly may grant supervisory authority to individuals, statutory supervisory status requires the existence of "actual authority," and "mere paper authority does not confer supervisory status." *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243 fn. 1 (1997). Also, absent evidence that individuals possess any of the enumerated indicia of supervisory status in Section 2(11), "there is no reason to consider so-called secondary indicia, such as their titles, the employee-supervisor ratio . . . or pay differentials between them and others in their departments." *Housner Hard-Chrome of Ky., Inc.*, supra at 427. Finally, the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Azusa Ranch Market*, 321 NLRB 811, 812 ((1996); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981).

I do not believe that Jose Ramirez should be categorized as a 2(11) supervisor for Respondent. Thus, analysis of Respondent's own description of a foreman's authority, which, Patrick Kay admitted, was accurate, discloses that it includes none of the statutory indicia of supervisorial authority. Moreover, Salvador Guardado admitted that, while acting as a foreman over a roofing crew, Ramirez, who spent 90 percent of his time working with his tools, possessed no authority to hire or fire employees, to recommend the discharge of employees, to lay off or recall employees from layoff status, or to promote[61] or reward employees. While Guardado stated that Ramirez had recommended the hiring of eight to ten individuals, he conceded three (Ramirez' brother, his cousin, and one other) were hired because they previously had worked for Respondent, and the remainder were hired after each was interviewed regarding his knowledge of roofing work. Guardado further admitted that Ramirez lacked authority to suspend employees, and, while the alleged discriminatee ostensibly was authorized to discipline by sending employees, who paid no attention to his instructions, to the office, Guardado was unable to recall when, if ever, Ramirez did so. Ramirez himself conceded he possessed authority to discipline contumacious employees by ordering them to leave the jobsite; however, there is no record evidence that he ever exercised said authority and he denied doing so. Regarding the assigning of work and transferring personnel, Guardado conceded that the work of the employees on a roofing crew is repetitive on a daily basis and a foreman's assignment of work entails merely directing employees to work on particular houses and that, while foremen inform superintendents if they have more workers than are required to complete the assigned work, the superintendents ultimately are responsible for transfers including deciding upon the locations to which employees are to be transferred. Also, while there can be no doubt that Rami-

[60] Inasmuch as Cheryl Daniel was not involved in the decision to terminate alleged discriminatees, Camargo and Ramirez, I place no reliance upon her justification for the discharges—safety is of such paramount importance to Respondent that failing to acknowledge a safety rules violation places Respondent "at risk." In this regard, I note that Respondent's safety policies and procedures manual neither contains a requirement that employees sign safety warning notices nor sets forth a punishment for failure to do so. Further, while, in fact, Respondent has terminated employees pursuant to its progressive disciplinary policy, it is also true that Respondent has merely suspended, but not terminated, employees for serious acts of misconduct including disregarding a supervisor's instructions and damaging relations with a customer and using abusive language toward and fighting with fellow employees.

[61] Guardado stated that Ramirez was authorized to recommend the promotion of employees, who worked on his crews, for promotion to foreman positions; however, he conceded that, prior to promotion, such employees are sent to other housing tracts where they are observed by superintendents to determine if they are able to perform the work.

rez possessed authority to grant time off to employees on his roofing crews, roofers are paid by the piece for their work and are not paid for unfinished work.

Furthermore, during his tenure with Respondent, Ramirez did not regularly act as a roofing foreman; rather, he "sometimes" worked in said capacity and "sometimes" worked as a rank-and-file roofer along with a helper. When performing work in the latter capacity, which he was doing at the time of his discharge, Ramirez conceded he was responsible for the work performed by his helper; however, Respondent failed to offer, and the record is devoid of, any evidence probative of his statutory supervisorial authority in such circumstances. Further, while an individual, who acts as a foreman for Respondent, must place his signature upon the weekly time records for each person on his crew, the alleged discriminatee was uncontroverted that, while just performing roofing work, he was not required to execute the weekly time records of his helper. Therefore, assuming arguendo that, while working as a foreman over a roofing crew. Ramirez exercised the authority of a statutory supervisor, and that, during the remainder of his tenure with Respondent, he worked as a rank-and-file employee, "the legal standard for a supervisory determination is whether the individual [spends] a regular and substantial portion of his working time in a supervisory position or whether such work is merely sporadic and insignificant." *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992). As stated above, it was Respondent's burden of proof, and, other than Ramirez' own, uncontroverted, and vague estimate of his time, there is no record evidence, establishing that he worked other than sporadically as a foreman. Accordingly, I believe Respondent failed to meet its burden of proof in this regard—to establish that Ramirez spent a "regular and substantial portion" of his working time as a foreman for Respondent. In all the foregoing circumstances, I conclude that, at the time of his discharge, Jose Ramirez was an employee for Respondent within the meaning of Section 2(3) of the Act and not a supervisor within the meaning of Section 2(11) of the Act.[62]

Likewise, I do not believe that Celestino Gonzales acted as a 2(11) supervisor for Respondent. Thus, other than Patrick Kay's assertion that, as an operator, Gonzales' foreman functions were the same as those of Jose Ramirez and that the duties and responsibilities of foreman "go straight across the board," Respondent offered no evidence regarding Gonzales' alleged statutory supervisorial status, and I place no reliance upon the testimony of the mendacious Kay. Gonzales, whose demeanor, while testifying, was that of a candid witness, specifically denied having any authority to hire, to fire, to layoff and to recall, to transfer, to promote, to discipline, to assign work, to suspend, to reward, to remedy grievances, or to recommend transfers, promotions, or the hiring of employees or their discharges. In these circumstances, as he possessed none of the primary indicia of a statutory supervisor,[63] I find that, at the time of his layoff by Respondent, Gonzales was an employee within the meaning of Section 2(3) of the Act.

Based on the foregoing, I find that Respondent laid off its employees, Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena, and discharged its employees, Jesus Camargo and Jose Ramirez, because of their support for the Union in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off its employees, Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena, because of their support for the Union, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

4. By discharging its employees, Jesus Camargo and Jose Ramirez, because of their support for the Union, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

5. By conditioning its reinstatement of discharged employees upon their renunciation of their support for the Union, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act

6. By interrogating its employees regarding their union membership, sympathies, and activities, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

7. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has engaged in no violations of the Act not specifically found above.

REMEDY

I have found that Respondent committed serious unfair labor practices within the meaning of Section 8(a)(1) and (3) and of the Act. Therefore, I shall recommend that it be ordered to cease and desist from engaging in such acts and conduct and to take certain affirmative actions which are necessary to effectuate the purposes and policies of the Act. Having concluded that Respondent unlawfully laid off its employees Celestino Gonzales, Martin Gonzalez, and Ricardo Camarena and unlawfully discharged its employees Jesus Camargo and Jose Ramirez, I shall recommend that Respondent be ordered to offer to each immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges of employment to which each he may have been entitled, and to make each whole, with interest, for any losses he may have suffered as a result of Respondent's unlawful discrimination against him. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950)

[62] I have, of course, considered that, when working as a foreman, Ramirez received a weekly bonus. Such is only a secondary indicia of supervisorial authority; noting the questionable extent of his authority to exercise any of the primary indicia of a 2(11) supervisor, any reliance upon a pay differential between Ramirez and other employees is not warranted.

[63] While he suggested to Martin Gonzalez that he apply for a job with Respondent, there is no record evidence that he recommended the hiring of his nephew to Respondent.

plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, I issue the following recommended [64]

ORDER

The Respondent, Davey Roofing, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off its employees because of their support for the Union.

(b) Discharging its employees because of their support for the Union.

(c) Conditioning its reinstatement of discharged employees upon their renunciation of their support for the Union.

(d) Interrogating its employees regarding their union membership, sympathies, or activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions deemed necessary to effectuate the purposes and policies of the Act.

(a) Offer immediate and full reinstatement to Celestino Gonzales, Martin Gonzalez, Ricardo Camarena, Jesus Camargo, and Jose Ramirez to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges of employment to which each may have been entitled and make each whole, with interest, for any losses each may have suffered as a result of its unlawful discrimination against him, in the manner proscribed in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of employees Gonzales, Gonzalez, and Camarena and the unlawful terminations of employees Camargo and Ramirez and, within 3 days thereafter, notify each employee, in writing, that this has been done and that his layoff or termination will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[65] Copies of the notice, in English and in Spanish, on forms provided by the Regional Director of Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated: September 28, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT lay off our employees because they support United Union of Roofers, Water Proofers, and Allied Workers, Local 162, AFL–CIO (the Union).

WE WILL NOT discharge our employees because they support the Union.

WE WILL NOT condition reinstatement of our terminated employees upon their renunciation of their support for the Union.

WE WILL NOT interrogate our employees regarding their union membership, sympathies, or activities.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to employees Celestino Gonzales, Martin Gonzalez, Ricardo Camarena, Jesus Camargo, and Jose Ramirez to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions without prejudice to the seniority of each or to any other rights or privileges of employment to which each is entitled and make each whole, with interest, for any losses he may have suffered as a result of our discrimination against him.

WE WILL, within 14 days of the date of the instant Order, expunge from our files any references to our unlawful layoffs and discharges and inform the above-named individuals that such has been done and that our unlawful actions will never be used against them in any way.

DAVEY ROOFING, INC.

[64] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[65] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."